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Supreme Court of the United States.

WILLIAM H. JONES, JOHN HILL AND EDGAR POE LEE, Plaintiffs in Error,

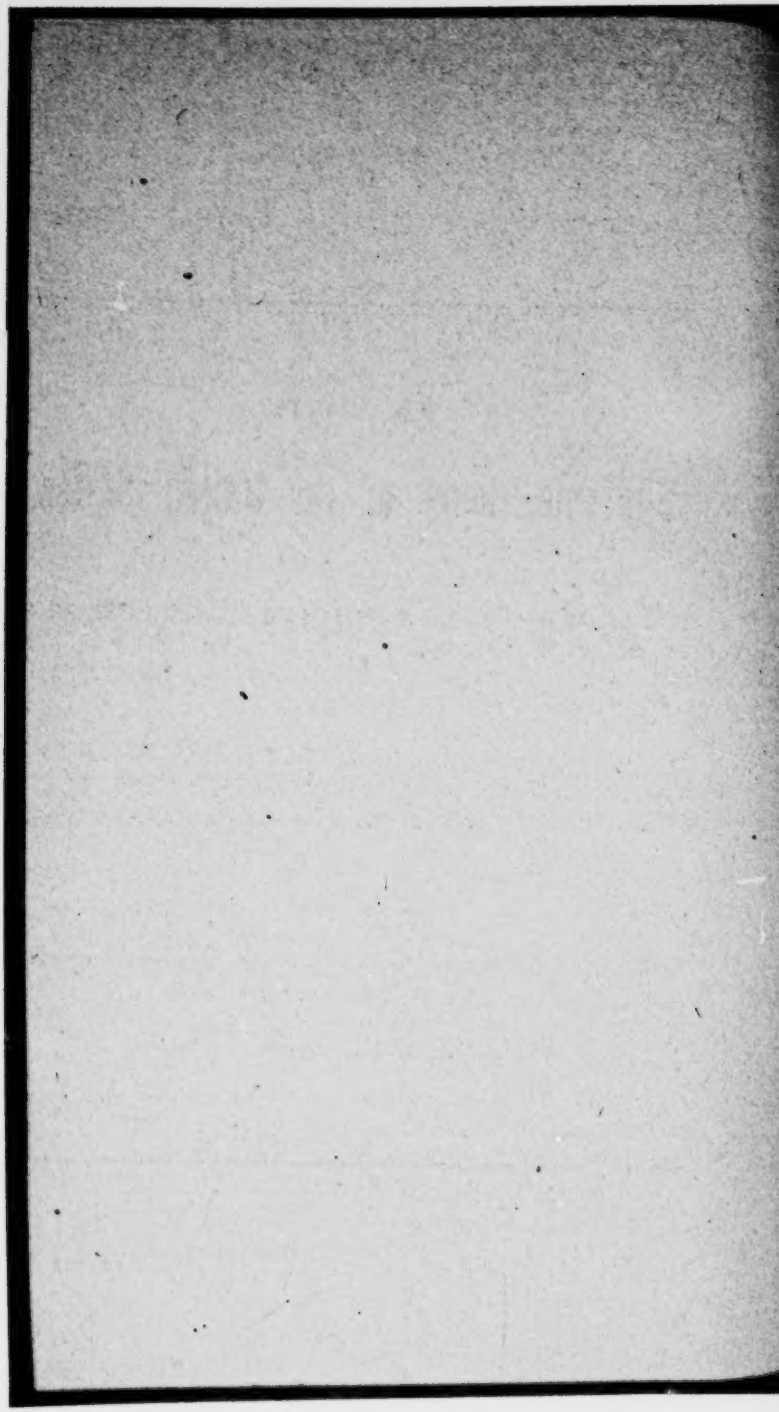
vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; AND OTHERS, CONSTITUTING THE STATE BOARD OF CANVASSERS OF VIRGINIA, Defendants in Error.

No. 189.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VA.

BRIEF FOR THE DEFENDANTS IN ERROR.



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STATEMENT OF THE CASE.

This was a petition for a writ of prohibition filed in the Circuit Court of the United States for the Eastern District of Virginia.

Upon the filing of the petition, the court below issued a rule against the defendants, requiring them to show cause why a prohibition should not issue in accordance with the prayer of the petition.

The defendants filed an answer to this rule, which is, in effect, a demurrer to the petition, setting forth the grounds upon which the court should decline to award a prohibition upon the facts stated in the petition.

Upon the hearing of the rule, the lower court was of opinion that the complainants were not entitled to a prohibition, and

entered an order dismissing the cause; and from this order, the present writ of error has been taken.

The case stated by the petition is, that the petitioners were wrongfully refused registration by the registration officers, though two of them claimed to be entitled to register by reason of property qualifications, and one of them claimed to be entitled to register by reason of the fact that he had served as a soldier and been honorably discharged. It will be observed in passing, that the ordinance of registration gave the right of appeal to any applicant who was refused registration; and the petitioners, therefore, had a clear and ample remedy for the grievance of which they complain, of which remedy they wholly failed to avail themselves.

The complainants do not allege that they offered to vote at all, their grievance consisting in having been refused registration by the Board of Registrars, which rejection they made no effort to redress in the manner pointed out by the registration ordinance.

The provision of the ordinance of registration concerning appeals is contained in section 7, which reads as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county, or to the corporation court of the city, in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing, to have his right to register determined, containing a statement of the facts proved before said board, to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor ("of") the petitioner."

The Board of State Canvassers, the defendants to the petition in this case, consists of the Governor, Secretary of the Commonwealth, Auditor of Public Accounts, Treasurer and Attorney-General of the Commonwealth of Virginia, who are constituted the board under section 139 of the Code of Virginia of 1887, which reads as follows:

"Sec. 139. *Duty of State Canvassers.*—The Governor, Secretary of the Commonwealth, Auditor of Public Accounts, State Treasurer, Attorney-General, or any three of them, shall constitute the Board of State Canvassers."

The duties of the board are defined in section 142 of the Code of Virginia of 1887, which reads as follows:

"Sec. 142. *How Election Returns Canvassed by State Board, and Certificates of Election Given.*—For the purpose of canvassing the result of elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the fourth Monday in November next after the election, when they shall, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, proceed to examine and make statements of the whole number of votes given at any such election for Attorney-

General, members of the Senate and House of Delegates, representatives in Congress, and electors of President and Vice-President of the United States, or for so many of said officers as have been voted for at such election, which statements shall show the names of persons to whom such votes have been given for either of the said offices, and the whole number given to each, distinguishing the several districts, cities, and counties in which they were given; they shall certify such statements to be correct and subscribe their names thereto, and they shall thereupon determine what persons have been by the greatest number of votes duly elected to such offices, or either of them, and shall endorse and subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. The Secretary of the Commonwealth shall record, in a suitable book to be kept by him in his office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and shall, without delay, make out and transmit to each of the persons thereby declared to be elected (except the Attorney-General, who shall be commissioned by the Governor), a certificate of his election, certified by him under his seal of office. In the election of a Senator, he shall also forward to the Senate a certificate of the election of such Senator; and in the case of the election of a member of the House of Delegates, he shall forward to the clerk of the House of Delegates a certificate of the election of such member. And upon the first day of the session of the General Assembly, he shall lay before each house a list of the members elected thereto, with the districts they represent. In cases of special elections to fill vacancies held at

> any other time than that fixed for general elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the day after the returns of such elections are received, for the purpose of canvassing the result of such special elections in the manner hereinbefore set forth; and if all the abstracts of votes to be counted shall not have been received within the twelve days, the said board shall adjourn from day to day until they shall be so received by the Secretary of the Commonwealth."

Sections 139 and 142 were enacted in the year 1870, in substantially the same form in which they now stand in the Code of Virginia. (See Acts of 1869-'70, chapter 76, sections 45, 48, 50.) The said sections, and also the provisions of the Code apportioning representation of the State of Virginia in the House of Representatives, and other provisions relating to the election of representatives from Virginia, contained in the statutes of Virginia, were enacted by the State of Virginia in pursuance of Article I., Section 4, Clause 1, of the Constitution of the United States, which reads as follows:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed by each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The Congress has allowed the States to make regulations on this subject. Shortly after the Federal Constitution was adopted, Virginia, in pursuance of this provision, enacted laws apportioning her representation in the House of Representatives, declaring when and how members of that house should be chosen, and providing for the return of Congressional elections, and declaring the results thereof. (See 12th Hening's Statutes

at Large, 653; 13th Hening's Statutes at Large, 331; First Tucker's Blackstone, 191.)

These methods have from time to time been changed in form, but regulations on the subject have existed continuously in the statute law of Virginia. The statute in relation to canvassing returns and issuing certificates of election to members of the House of Representatives, being section 142 of the Code of Virginia, already quoted, has been in force in substantially the same form as it now stands in the Code since its enactment in 1870. This statute is a valid act of the Legislature, passed pursuant to the authority granted by the Federal Constitution, and establishes the only method in existence for ascertaining and certifying the results of election of members of the House of Representatives in Virginia.

The respondents were elected to their offices under the Constitution and laws of the State of Virginia existing prior to the adoption of the present Constitution, and the validity of sections 139 and 142 of the Code of Virginia of 1887 is not denied or questioned by the complainant petitioners; nor is the title of the respondents to their offices as *de jure* and *de facto* officers denied.

The acts required by the statute to be done by the State Board of Canvassers could be performed only in their official character as members of the board, and none of the acts could be done by any member of the board alone or individually.

This statement of the facts and the statutes of Virginia, is, we believe, sufficient to enable us to state intelligently the grounds upon which the defendants resisted the application for a prohibition in this case and our reasons in support of that position.

Argument of the Points Presented.

I.

The first objection made in the answer to the petition for prohibition is, that the case is in substance a suit against the

State of Virginia, and prohibited by the eleventh amendment of the Federal Constitution.

Our contention is, that the suit against the Board of State Canvassers is either a suit against the State of Virginia or, if not so considered, that the State of Virginia is an indispensible party to any relief; and, upon either alternative, this proceeding is barred.

In order to determine whether this be a suit against the State or not, it is necessary to enquire what is the nature of the case made, and the precise relief sought, by the petition.

Let it be assumed that a wrong was done the petitioners by the alleged refusal of the registrars to put their names on the registration books; still those wrongs were past when this petition was filed, and the present suit is not brought for the purpose of redressing those wrongs, and no relief granted in this suit could have the effect of redressing those alleged wrongs. The present suit is not for the purpose of recovering damages for the refusal to register the plaintiffs. Being a suit in prohibition, it could not, of course, have that effect. The suit is not brought against the registrars who conducted the registration; it is not brought for the purpose of compelling them to place the names of the complainants upon the registration lists.

The primary right of the voter is the right to register and vote. When the voter sues in damages for the wrongful deprivation of that right, or brings proceedings to enforce specifically its enjoyment, whatever may be the difficulties in the way of the latter remedy especially, he at least does not interfere with the rights and interests of other voters and other members of the body politic in the State. But in this case, the petitioners are seeking to have the court declare the entire election null and void, which was held on November the 4th, 1902, and to restrain the Board of State Canvassers from canvassing the returns from the whole State of Virginia, and to prevent the issuance of certificates of election to the persons who received a majority of the votes cast at that election for members of the House of Representatives.

The relief prayed for could not be granted without affecting the rights of others not before the court. It would restrain the Board of State Canvassers in the performance of duties and functions that are purely political and governmental under the statute law of Virginia—duties and functions devolving upon the board solely as a public agency, in the performance of which, not only the Commonwealth of Virginia, but the United States also, is concerned.

This being the nature of the relief prayed, we submit that the proceeding is one against the State of Virginia, under the decisions of the Supreme Court of the United States.

In the case of *Cunningham* v. *Railroad Co.*, 109 U. S., 452, the Supreme Court of the United States, speaking by Mr. Justice Miller, defined two classes of cases in which suits against the officers of the State may be maintained in the Federal courts. The first class of cases stated by Mr. Justice Miller are cases where the State officers are sued in an action for damages occasioned by an act injurious to the plaintiffs, and where the officers seek to justify their action under a State statute which is unconstitutional.

The second class of cases referred to by Mr. Justice Miller consists of cases in which the Federal courts are called upon by an injunction, or some other writ, to compel or to restrain the doing of some act by a defendant who is an officer of the State. As to this class of cases, Mr. Justice Miller says they can be maintained "where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, *not affecting the general powers or functions of the government*, but in the performance of which one or more individuals have a *distinct interest* capable of enforcement by judicial process."

And Mr. Justice Miller added that in entertaining cases of this class, the Federal courts have gone to the "verge of sound doctrine, if not beyond it, and the principles should be extended no further."

It is plain, we submit, that the present case cannot be brought within the class of cases just mentioned by Mr. Justice Miller.

In the first place, the petitioners have not a distinct or separate interest in the performance of the duties imposed upon the Board of State Canvassers, but an interest in common with every other member of the body politic in Virginia. All persons who voted at the election of November the 4th, 1902, have an interest in the action of the Board of State canvassers in canvassing and certifying the returns of election. All persons who neglected to vote at that election are presumed in law to have assented to the action of the majority of those who did not, and they are, therefore, likewise interested. The candidates for the House of Representatives voted for have an interest; the Commonwealth of Virginia and the United States, both have interests, not of a property or pecuniary character, but they have important interests in their fundamental and political capacities. The State of Virginia is entitled to representation in Congress, and its interests would have been obstructed and interfered with by any prohibition restraining the canvassing of the returns.

The complainants' alleged rights, then, are not distinct and separate rights, as required by the language used by Mr. Justice Miller in the case just cited, which are capable of enforcement by judicial process, but are rights (if they can be properly so called at all) which the petitioners enjoy only as a part of the body politic and in common with all other citizens in Virginia.

When we look, on the other hand, at the nature of the duties and functions of the defendants, it will be seen that they are of a character precisely opposite to what Mr. Justice Miller defines as a condition to the jurisdiction of a Federal court when the suit is brought against officers of a State. He says that the suit must be brought to compel the performance of a well-defined duty in regard to a specific matter, "not affecting the general powers or functions of the government."

In the present case, the duties of the board sought to be restrained are purely governmental, affecting the entire body politic in its relation to the State and the Federal governments. The relief prayed is against the respondents in their political capacity. It constitutes a suit against the action of

the State itself, affecting the interests of the State and the people generally, of which the State itself is the only representative, under the principles of public law. The defendants discharge their duties solely as a board, and, in the discharge of those duties they have no private interest whatever. The Board of State Canvassers is an agency of the State of Virginia, established in pursuance of the Federal Constitution, for canvassing the returns of members of the House of Representatives.

In *McCulloch* v. *State of Maryland,* 4 Wheaton, 316; *Collector* v. *Day,* 11 Wallace, 113, and a great number of other cases, the Supreme Court of the United States has held that neither the United States, nor the several States, can interfere with or obstruct the agencies and instrumentalities of the other sovereignty lawfully existing for the purpose of carrying out its purposes and executing its powers within the sphere of its power and duties.

The judiciary act giving jurisdiction to the Federal courts was never intended to transgress this fundamental rule of the partition of powers between the two governments by allowing the Federal courts to interfere with or restrain a board or agency of the State in the exercise of its political and governmental functions.

If the lower court had granted a prohibition in this case, it would have afforded no redress to the petitioners for the violation of their alleged rights to register and vote, but would only have prevented the Board of Canvassers from certifying the returns of the election and awarding certificates to members of the House of Representatives. In other words, the only effect a judgment, if rendered, would have had, would be, to control the political action of the Board of State Canvassers as one of the agencies of the government of Virginia, without giving any redress for any alleged wrong of the petitioners.

It is well settled that it is not necessary that the State should be made a party in order that the suit may be against her. The suit is equally against her, if against officers of the State and

for the purpose of controlling their governmental or political powers.

We submit, that the present case does not fall within the line of cases in which the Federal courts have taken jurisdiction to control State officers as to some act which the plaintiff was entitled to have performed, or restrained as a matter of individual and separate right, but falls within the class of cases in which jurisdiction has been declined, because the object was to control officers of the State in the discharge of duties relating to the revenue or property or political interests and action of the State. *Louisiana* v. *Jumel*, 107 U. S., 711; *Hagood* v. *Southern*, 117 U. S., 52; *Cunningham* v. *R. R. Co.*, 109 U. S., 446; Ex Parte Ayers, 123 U. S., 443; and cases cited in the foregoing cases; and *McCawley* v. *Kellog*, 2 Woods' Circuit Ct. Rep. 13; *Collector* v. *Day*, 11 Wallace, 113. Fitts v. McGhee, 172 U.S. 516, 525, 530.

II.

It was objected by the defendants in the lower court, in their answer to the rule, that there was no act of Congress giving the United States Circuit Court jurisdiction of this proceeding.

(1) The United States Circuit Court had no jurisdiction of this proceeding under the act of 1887, as amended by the act of August 13th, 1888, giving the United States Circuit Court jurisdiction of all cases at law, or in equity, arising under the Constitution or laws of the United States, where the amount in dispute exceeds two thousand dollars, for the reason that the petition in this case does not show that the amount involved in dispute exceeds the sum of two thousand dollars; and we submit that this objection was sufficiently made in the fifth clause of the answer in the following language:

> "In order that the complainants may maintain this petition, they must show that the case is embraced within the provisions of some act of Congress conferring the particular jurisdiction on this court; and they submit that there is no such act of Congress; and, therefore, the court is

without jurisdiction to entertain this proceeding."

(2) It is plain that this proceeding is not embraced within the purview of section 1979, or clause 16 of section 629 of the United States Revised Statutes. See *Holt* v. *Indiana Manufacturing Co.*, 176 U. S., 68; *Giles* v. *Harris*, 189 U. S.

(3) Opposing counsel seem to contend that jurisdiction is conferred by the twelfth clause of section 629 of the United States Revised States; but it is plain that this clause refers exclusively to suits brought by a person to recover damages for injuries suffered in the execution of the laws of the United States. This is rendered plainer (if possible) by reference to the acts of Congress on which this clause is founded.

(4) Opposing counsel seem also to contend that jurisdiction may be derived in this case from section 722 of the United States Statutes. But this section plainly refers to suits brought for the protection of persons in their civil rights. In addition this section does not confer jurisdiction, but merely adopts forms of procedure prevailing in State courts; and in this purview it does not aid the plaintiffs here, since it is well settled in Virginia that prohibition will not lie in a case like this. See *Burch* v. *Hardwicke*, 23 Gratt., 51.

(5) The only statute of the United States which gives jurisdiction to the United States courts of the writ of prohibition is section 716 of the United States Revised Statutes.

It has been held by the Supreme Court of the United States that writs of mandamus (which, for the purpose of the jurisdiction of the court to issue such writs, stand upon the same footing as writs of prohibition), are not embraced within the eleventh section of the judiciary act of 1789, and, therefore, of course, not within the first section of the Acts of 1887, as amended by the act of August 13th, 1888, giving to the circuit courts jurisdiction of cases at law and in equity arising under the Constitution and laws of the United States, or arising between citizens of different States, &c.

Writs of prohibition and mandamus were considered, at the

adoption of the Federal Constitution and the judiciary act of 1789, as high prerogative writs which were extraordinary in their character, and not issuing as of right. Jurisdiction of such writs was conferred by the fourteenth section of the judiciary act, which, now amended, constitutes section 716 of the United States Revised Statutes, and reads as follows:

> "The Supreme Court, and the Circuit and District Courts, shall have the power to issue all writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

The Supreme Court of the United States has held that the Circuit Courts of the United States have, by virtue of this section, no power to issue original writs of mandamus and prohibition, but only ancillary writs when necessary for the exercise of their respective jurisdictions; that is, for the purpose of enforcing, or preventing interference with, jurisdiction of a case already pending in the court, the said writ being merely auxiliary to, and in aid of, the jurisdiction already rightfully acquired. This subject was considered and it was so declared by the United States Supreme Court in *Bath County* v. *Amy*, 13 Wallace, 244, in respect to writs of mandamus; and precisely the same reasoning which was in that case applied to writs of mandamus is equally applicable to writs of prohibition.

In *Bath County* v. *Amy*, 13, Wallace, 248, this court said:

> "While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act. * * * Were there nothing more, then, in the judiciary act than the grant of general

authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that circuit courts shall have 'power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law.' Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred, only to a limited extent, upon the circuit courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given."

The court further said:

"And in *McClung* v. *Silliman,* this court said, when speaking of the power to issue writs of mandamus: 'The fourteenth section of the act under consideration (the judiciary act) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out.' In other words, the writ cannot be used to confer a jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

And the court adds:

> "The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the circuit courts."

The court then proceeds to say that the process act of 1828 was merely a process act, and did not enlarge the jurisdiction of the United States Circuit Courts.

The court concluded as follows:

> "There is, then, no act of Congress which has conferred upon circuit courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.
>
> "Applying this rule to the present case, it is decisive. The relator's claim for payment had not been brought to judgment in the circuit court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous."

The same principles are laid down in other cases. See *Graham* v. *Norton*, 15 Wall., 427; *County of Greene* vs. *Daniel*, 102 U. S., 187; *Davenport* v. *Dodge*, 105 U. S., 237; *Rosenbaum* v. *Bauer*, 120 U. S., 450; *Smith* v. *Barbour Co.*, 127 U. S., 112; Ex Parte City Bank of New Orleans, 3 How., 292, 322; *In re* Bininger, 7 Blatchf., 59; 67 Federal Reporter, 384; 114 Federal Reporter, 437; *Louisiana* v. *Jumel*, 107 U. S., 727; 2nd Spelling Extraordinary Relief, Secs. 1367, 1737; 1st Desty Fed. Proced. 9th Ed. Sec. 84, p. 341 and cases cited.

III.

Another ground of objection made by the defendants in the lower court was that a writ of prohibition was not an appropriate remedy in this case, for the reasons—

(1) That a writ of prohibition only lies to a court; and,

(2) To an inferior court; and

(3) To restrain such court from acting beyond the bounds of its jurisdiction. See *Birch* v. *Hardwicke*, 23 Gratt., 51, 60; *James* v. *Stokes*, 77 Va., 229; High on Extraordinary Remedies, Secs. 762, 769, 782; 2nd Spelling on Extraordinary Relief, Secs. 1722, 1732; Ex Parte Broadlacht, 2 Hill, 367; *State* v. *Justices*, 41 Mo., 44; *State* v. *Gary*, 33 Wis., 93; 3 Blackstone's Commentaries, page 112; 23 Am. & Eng. Enc. of Law, p. 203, 204, where many cases are cited.

None of these requisites exists in this case:

(1) The Board of State Canvassers is not a court, and does not discharge judicial functions. Its duties are all set forth in section 142 of the Code of Virginia of 1887, except the single duty of determining by lot, in case of a tie, as is provided in section 143. Their duties are ministerial and executive, and not judicial; and no prohibition, therefore, could issue against the said board.

(2) A prohibition can only issue to supervise and control the jurisdiction of *inferior court*. And the Board of State Canvassers is not only not a court, but if it were, would not be a court inferior to the Circuit Court of the United States. Section 720 of the Revised Statutes of the United States expressly declares that a writ of injunction shall not be granted by any United States court to stay proceedings in any State court, except in bankruptcy proceedings. We submit that writs of prohibition are clearly within the spirit of this restriction upon the power of the Federal courts. No doubt, writs of prohibition would have been specifically named in section 720, except that the framers of the act recognized that such writs issue only to inferior courts, and it was not contemplated that courts of State could be considered inferior to the United States

courts, except in cases where appeals are provided for from courts of the State directly to the Supreme Court of the United States. It was said by this court in *Riggs* v. *Johnson Co.*, 6 Wall., 195: "State courts are exempt from all interference by the Federal tribunals * * * Circuit courts and State courts act separately and independently of each other in their respective spheres of action. The process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the circuit courts." If, then, the Board of Canvassers were a court, this principle would prevent a writ of prohibition issuing to it from a circuit court of the United States.

(3) The office of a writ of prohibition is simply to restrain the lower court from exceeding its jurisdiction. It cannot be used to control the judgment to be rendered by the lower court. The Board of State Canvassers were proceeding under a valid statute of Virginia to canvass the returns from the different congressional districts of Virginia. In so doing, the board was clearly acting within its jurisdiction. The purpose of the writ here was not to keep them within their jurisdiction, but to compel them, in the exercise of their jurisdiction, to decide in a certain way. The writ of prohibition could not be used for such a purpose.

IV.

The United States Circuit Court could not properly interfere by prohibition with the acts of the Board of State Canvassers in canvassing the returns, ascertaining the results of the election for members of the House of Representatives, and issuing certificates to those receiving a majority of the votes cast; for the reason that the exercise of such a jurisdiction would invade the province and independence of the House of Representatives, a co-ordinate branch of the Federal government.

The House of Representatives is, by the Constitution of the United States, made the sole judge of the qualifications and returns of its members. The Board of State Canvassers is an instrumentality created by the State of Virginia, under and in pursuance of the Federal Constitution for canvassing the returns, ascertaining the result and issuing certificates of election to members of the House of Representatives; and we respectfully submit, that it is clearly incompetent for any court to interfere with such an agency in respect to matters of which the House of Representatives is made the sole judge under the Federal Constitution. The exercise of such jurisdiction necessarily impairs, and might be used to destroy the independence of the house itself. We have stated somewhat more fully the grounds of this objection in the brief filed by us in the case of *Selden and others* v. *Montague, Governor, and others,* pending in this court and we will not repeat them here.

V

The next objection made by the defendants in their answer was, that the petitioners did not set forth in their petition any case appropriate for judicial cognizance and relief in any court.

The wrong alleged by them is that the registrars wrongfully refused to place their names on the registration lists. If such alleged wrong was, in fact, done them, it is obvious that the appropriate remedy was in some proceeding against the registrars. The petitioners were given remedies against the registrars for the redress of any such wrong, both by proceedings for specific relief to secure the placing of their names upon the registration lists and by an action for damages. The specific relief was secured them by an appeal to the courts, as provided in section 7 of the registration ordinance already quoted in this brief, by which any applicant for registration, who is denied the privilege of registration, is allowed to appeal to the courts; and if he prevails, it is provided that his name shall be put upon the registration lists. In addition, if he is wrongfully

denied registration, he has his action for damages against the registrars, provided he can make out a case of corrupt and wilful denial of the right to register. Having these remedies, and not resorting to them, we submit it is not admissible for the petitioners to resort to the proceeding by prohibition, which can only be used when there is no other adequate remedy.

In addition, even if the petitioners were awarded a writ of prohibition, it would not remedy the wrong of which they complain, which is that they were refused the right to register by the Board of Registrars, since it would neither place them on the registration lists nor give them damages for the denial of the right to register.

The petitioners are not seeking to protect or vindicate these special and peculiar rights, but in this proceeding are asking the court to restrain all steps to declare the results of an election in which they allege they were denied participation, upon the ground that the law under which the election was held was unconstitutional. It is plain that if the petitioners have any right in respect to that matter, it is one which they enjoy in common with all members of the body politic in Virginia.

We respectfully submit, that the courts have no general jurisdiction to restrain the execution of a law upon the claim that it is unconstitutional, except at the suit of some one who alleges that he has some peculiar and special right of property, or some other distinct right, that will be violated by the threatened action; otherwise, the courts would be constantly engaged in supervising and controlling public officers in the discharge of their political and governmental duties, upon the plea that the statute under which they were acting was unconstitutional.

The duties of the Board of State Canvassers sought to be restrained in this case were not functions in which the petitioners were alone interested, but affected the people of the State gnerally. If the petitioners can be said to have had any rights in proper sense of that term in relation to the canvassing of the returns and awarding certificates of election by the board, they were not rights peculiar to themselves, but rights which they enjoy in common with all members of the body politic in Vir-

ginia; and the effort to restrain the board from performing those duties was not an effort to vindicate special rights enjoyed by the petitioners, but simply to enforce what the petitioners alleged was a public duty of the board—namely, to disregard entirely the election held on the previous 4th of November, on the ground that the law under which it was held was unconstitutional. What was sought, therefore, by the petitioners, was to have the court direct the board in the performance of public and governmental duties.

Courts are not constituted for the purpose of administering such a jurisdiction, and under the system of partition of powers between the different departments of government which prevails in the United States, it would necessarily involve an invasion of the executive department if the courts should assume such a jurisdiction. Nothing is better settled than that the courts will not interfere to restrain or control public officers in the exercise of duties of this character, either by injunction (see *Giles* v. *Harris*, 189 U. S., 475), nor by mandamus (see *Marbury* v. *Madison*, 1st Cranch, 137; *United States* v. *Raum*, 135 U. S., 200, 204; *New Orleans* v. *Payne*, 147 U. S., 261), or by writ of prohibition (see *Burch* v. *Hardwicke*, 23 Gratt., 51, 60; *Grier* v. *Taylor*, 4 McCord, 206; High on Extraordinary Remedies, Sec. 783; 2 Spelling Extraordinary Relief, Sec. 1722). See *Georgia* v. *Stanton*, 6 Wallace, 50.

The remaining questions arising upon this record are also involved in the appeal of *Wm. S. Selden and others* v. *Andrew J. Montague, Governor, and others*, pending in this court; and those questions are discussed by us in our brief, filed in that cause, and we beg leave, without repeating that discussion, to refer to what we say in that brief upon these questions.

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